1979

Utah Department of Transportation v. Glen E. Fuller And Connie J. Fuller, His Wife; Kimberly G. Fuller; Kent F. Fuller : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

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UTAH DEPARTMENT OF TRANSPORTATION,

Plaintiff-Respondent,

vs. Case No. [illegible]

GLEN E. FULLER and CONNIE J. FULLER, his wife; KIMBERLY G. FULLER; KENT F. FULLER,

Defendants-Appellants.

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BRIEF OF RESPONDENT

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INTERLOCUTORY APPEAL
TAKEN FROM ORDER OF IMMEDIATE OCCUPANCY
FIRST JUDICIAL DISTRICT COURT IN AND
BOX ELDER COUNTY, STATE OF UTAH
HONORABLE VeNOY CHRISTOFFERSEN

----ooOoo----

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JUL [illegible]

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IN THE SUPREME COURT OF THE STATE OF UTAH

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UTAH DEPARTMENT OF TRANSPORTATION,

Plaintiff-Respondent,

vs. Case No. 16404

GLEN E. FULLER and CONNIE J. FULLER, his wife; KIMBERLY G. FULLER; KENT F. FULLER,

Defendants-Appellants.

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BRIEF OF RESPONDENT

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INTERLOCUTORY APPEAL
TAKEN FROM ORDER OF IMMEDIATE OCCUPANCY
FIRST JUDICIAL DISTRICT COURT IN AND FOR
BOX ELDER COUNTY, STATE OF UTAH
HONORABLE VeNOY CHRISTOFFERSEN, JUDGE

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IN THE SUPREME COURT OF THE STATE OF UTAH

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UTAH DEPARTMENT OF TRANSPORTATION,

Plaintiff-Respondent,

vs.

Case No. 1640

GLEN E. FULLER and CONNIE J. FULLER, his wife; KIMBERLY G. FULLER; KENT F. FULLER,

Defendants-Appellants.

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BRIEF OF RESPONDENT

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NATURE OF THE CASE

Defendants bring this Interlocutory Appeal challenging the authority of Plaintiff to exercise its power of eminent domain for a public purpose.

DISPOSITION IN THE LOWER COURT

The District Court, having determined the public necessity requiring the acquisition of this land, issued a memorandum decision granting Plaintiff's motion for an order of immediate occupancy and denying Defendants' motion to dismiss.

Defendants sought and were granted authority to file an Interlocutory Appeal.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks to have the decision of the lower Court affirmed in all respects and for an order prohibiting Defendants from interfering with the construction of the rest area and proposed sewage lagoon.

STATEMENT OF FACTS

Plaintiff undertook the design of a roadside rest area on the west side of Interstate Highway 15 in Box Elder

County at a location approximately five miles northwest of Brigham City and about two blocks west of the Brigham City Airport. The total rest stop will contain about 19.54 acres of land. A necessary adjunct of the roadside rest area is a sewage lagoon since the existing sewer is too far away and the ground water is too high to tolerate a septic tank and accompanying drain fields. The lagoon will occupy an additional 6.05 acres. Several sites were studied to determine where to locate the sewage lagoon. Plaintiff's engineers selected the site, which is the subject of this litigation, based on its practical and economic advantages.

These advantages include a lower elevation to facilitate the drainage flow by gravity. The selected site is less expensive than any of the others, which includes the initial expense of acquisition as well as of construction. The site best meets the Department of Health regulations which require such lagoons to be at least 1000 feet from inhabitated areas. The proposed site will facilitate the hauling away of the excavated dirt, which is mostly clay and unsuitable for compaction at the rest area site as fill material. The size of this site is also agreeable with the Department of Health, which required a six-acre lagoon instead of the proposed three-acre lagoon.

The present capacity of the lagoon is based upon a projected twenty-year capacity and therefore is greater

than the immediate needs of Plaintiff. As a consequence, the Plaintiff has tentatively agreed to allow area residents to hook into the construction lagoon. However, they must pay their share of maintenance and must also bear the expense of hooking in. Furthermore, Plaintiff's projections indicate that Plaintiff will require the full capacity of the lagoon at some time within twenty years. Therefore, the landowners who use this lagoon are subject to termination at any time. This accommodation of area landowners is an incidental use and does not affect the public necessity of obtaining the land for a sewage lagoon.

At the hearing, Plaintiff produced several witnesses who testified as to the necessity of this taking. Defendants published the depositions of these witnesses and also cross-examined them. However, Defendants produced no witnesses of their own! After the hearing, the Defendants were given leave to file a memorandum of the applicable law. In their memorandum, the Defendants produced two affidavits of alleged experts who challenged the evidence as to cost which was submitted at the initial hearing. The Defendants never asked for leave to file these affidavits but were only given leave to file memoranda on the applicable law. The affidavits challenged not only the Plaintiff's estimated cost of placing a pipe under the freeway but the cost of hauling away the excavated material. Had

this evidence been submitted at the initial hearing, Plaintiff's witnesses would have refuted it since their estimates were based on recent contracts for such work that Plaintiff has been involved with.

The trial Judge refused to consider the Defendants' subsequent affidavits since the hearing was over and, after weighing the evidence properly submitted, granted Plaintiff's motion for an order of immediate occupancy.

ARGUMENT

POINT I

EVIDENCE NOT PRESENTED AT THE HEARING CANNOT BE CONSIDERED FOR THE FIRST TIME ON APPEAL

In the instant case, the only evidence produced by Defendants was offered after the initial contested hearing was over. The Court allowed the Defendants leave to file a memorandum on the applicable law, and in doing so, Defendants filed two affidavits. The Defendants neither asked for leave to file additional affidavits nor were ever granted such leave. Defendants were given only leave to file memoranda on the applicable law. The allowance of this evidence would act to the extreme prejudice of Plaintiff. The allowance of these affidavits at this point would preclude Plaintiff from

any cross-examination and would also preclude the Plaintiff's witnesses from refuting this testimony, which Plaintiff's witnesses are able to do. Judge Christoffersen recognized this and so declined to review the affidavits. His Memorandum Decision at page two states:

> At the time of the hearing no evidence was introduced at the hearing by the defendants that would controvert testimony given by the plaintiff's engineer, however, defendants seek to do so now by affidavits attached to their memorandum which adds additional evidence. Of course, the time for taking evidence was set previously at the hearing and the memorandum to be filed was memorandum in law applicable to this case and not the introduction of further testimony. (R. 50)

The exclusion of these affidavits was proper and the trial Judge issued the order of immediate occupancy based on the evidence properly before the Court. There was ample evidence to support the decision and therefore should not be disturbed on appeal. Salt Lake County v. Ramoselli, 567 P.2d 182 (Utah, 1977); Bountiful v. Swift, 535 P.2d 1236 (Utah, 1975).

Furthermore, the presentation of this evidence was untimely and so is not properly before this Court. Evidence not offered at the hearing cannot be considered for the first time on appeal. There was evidence presented by Plaintiff which supports the decision of the trial Court. Therefore, the decision of the trial Court should be affirmed.

POINT II

AN ORDER OF IMMEDIATE OCCUPANCY IS NOT REVERSIBLE UNLESS THE DECISION IS ARBITRARY AND CAPRICIOUS.

In State v. Denver & Rio Grande Western Railroad Co., 8 U.2d 236, 332 P.2d 926 (1958) the State desired to acquire property for a freeway that was occupied by railroad tracks. The trial judge denied an order of immediate occupancy because the railroad was also serving an existing public purpose. The Court recognized that the freeway was undoubtedly a higher and better public use but refused to reverse the trial Court as to the granting of the order of immediate occupancy. The Court stated:

> The granting of a motion for immediate occupancy has been held by this court primarily to be one directed to the sound discretion of the trial court, reversible only because of obvious abuse thereof; . . . 332 P.2d at 927

In Bountiful v. Swift, 535 P.2d 1236 (Utah, 1975) the City of Bountiful condemned land for a road and acquired an order of immediate occupancy. The condemnees challenged the order, claiming that the taking was not necessary and was not authorized. This Court upheld the order and in so doing said:

> The trial judge, among other things, is given the power to hear and decide if the conditions precedent to the taking are

met. Further, on a motion for immediate occupancy the trial court is empowered to grant or deny the motion according to the equity of the case. 535 P.2d at 1238.

In Utah Copper Co. v. Montana-Bingham Consolidated Mining Co., 69 Utah 423, 255 P. 672 (1926), plaintiff desired to build a ditch and pipeline across defendant's land to aid plaintiff's mining operations. The Court in this early case recognized that the decision to grant an order of immediate occupancy is discretionary with the trial Court.

The trial Judge in the present case weighed the evidence and granted an order of immediate occupancy. Judge Christoffersen, in the Memorandum Decision, stated that "the evidence taken at the hearing in this matter established this was the cheapest and best method of taking care of the sewage problem." (R. 49) The Judge had the discretion to make the decision he made. Because there is ample evidence to support the decision, the decision is not arbitrary and capricious and therefore is not reversible.

POINT III

PUBLIC NECESSITY IS A LEGISLATIVE QUESTION AND NOT REVIEWABLE

In Postal Telegraph Cable Co. v. Oregon Short Line Railroad Co. 23 Utah 474, 65 P. 735 (1901) the railroad company objected to the telegraph company placing its poles and lines

upon the railroad right-of-way. The Court determined the use to be public and so refused to review the necessity of such an action. The Court stated:

> It may be said to be a general rule that, unless a corporation exercising the power of eminent domain acts in bad faith or is guilty of oppression, its discretion in the selection of land will not be interfered with. (Citing cases.) With the degree of necessity or the extent which the property will advance the public purpose, the courts have nothing to do. (Citing cases.) When the use is public, the necessity of expediency of appropriating any particular property is not a subject of judicial cognizance. (Citing cases.) 65 P. at 739.

In Bountiful v. Swift, supra, at 1238, the Court stated:

> . . . necessity, expediency or propriety in opening a public street is a political question and in absence of fraud, bad faith, or abuse of discretion action of such boards will not be disturbed by the courts.

In North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925), the condemnee challenged a county's right to take land for highway purposes. The taking was upheld, the United States Supreme Court stating, ". . . the necessity and expediency of the taking of property for public use 'are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment.' (Citing cases.)" This view was also followed in Berman v. Parker, 348 U.S. 26

(1954) where condemnees challenged the right of a redevelopment agency to take their property. The Court upheld the taking and stated, "Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for the particular tract to complete the integrated plan vests in the discretion of the legislative branch." See also, U.S. v. 416.18 Acres of Land, 514 F.2d 627 (7th Cir. 1975); Ledford v. Corps of Engineers of U.S., 500 F.2d 26 (6th Cir. 1974); Mamer v. District of Columbia Redevelopment Land Agency, 284 F.2d 221 (D.C. Cir. 1960); U.S. v. Agee, 322 F.2d 139 (6th Cir. 1963); Harrison-Halsted Community Group v. Housing and Home Finance Agency, 310 F.2d 99 (7th Cir. 1962).

In the instant case, Plaintiff is constructing a rest area to facilitate and expedite the safe and enjoyable use of the interstate highway system. An essential part of a rest area is sewage disposal. This project, then, serves a public purpose and the necessity of it is to be determined by Plaintiff. Plaintiff's witnesses have also testified as to the necessity and the Memorandum Decision is based upon this testimony as to necessity. Therefore, the issue of necessity is not reviewable and the order of the District Court should be affirmed.

Defendants cite 1 Nichols on Eminent Domain, Section 4.11[2] for the proposition that the issue of necessity is a

judicial question. However, an examination of that entire section reveals that the issue of necessity presents a judicial question only when there is no possibility of the land condemned serving a public purpose:

> There is, however, at least a theoretical limit beyond which the legislature cannot go. The expediency of constructing a particular public improvement and the extent of the public necessity therefor are clearly not judicial questions; but it is obvious that, if property is taken in ostensible behalf of a public improvement which it can never by any possibility serve, it is being taken for a use that is not public, and the owner's constitutional rights call for protection by the courts. 1 Nichols on Eminent Domain, Section 4.11[2] p. 4-156. (Emphasis added.)

In fact, the cases in which a legislative (or administrative) decision as to necessity have been reversed are very few. Putting the sentence quoted by defendant in context with the sentences before and after, we find the following:

> While many courts have used sweeping expressions in the decisions in which they have disclaimed the power of supervising the selection of the site of public improvements, it may be safely said that the courts of the various states would feel bound to interfere to prevent an abuse of the discretion delegated to the legislature by an attempted appropriation of land in utter disregard of the possible necessity of its use, or when the alleged purpose was a cloak to some sinister scheme. In other words, the court would interpose in a case in which it did not merely disagree with the judgment of the legislature, but felt that that body had acted with total lack of judgment or in bad faith. In every case, therefore, it is a judicial question whether the taking is of such a nature that it is or may be founded on a public necessity. But while the courts have frequently de-

cleared their power to set aside acts of the legislature upon such a ground, cases in which the power has been actually exercised seem rarely to have arisen. 1 Nichols on Eminent Domain, Section 4.11[2] p. 4-157 to 4-158.

Furthermore, in Section 4.11[3] p. 4-184 to 4-185, Nichols states:

> That the legislature may, and usually does, delegate the power of selecting the land to be condemned to the public agent that is to do the work; in such case it makes little, if any, difference whether the grant of authority is, in terms, limited to such land as is "necessary" for the purpose in view, for a general grant of authority carries the same limitation by implication and in either case the necessity is for the condmnor and not for the courts to decide, and the decision of such condemnor is final as long as it acts reasonably and in good faith. (Emphasis added.)

In Section 4.11 p. 4-138 to 4-152 we find the following:

> Section 4.11. The overwhelming weight of authority makes clear beyond any possibility of doubt that the question of the necessity or expediency of a taking in eminent domain lies within the discretion of the legislature and is not a proper subject of judicial review.
>
> . . . In accordance with the general principle, it has been held that the courts may not inquire into the question,
>
> (1) whether there is any necessity for the taking,
>
> (2) whether there is any need for resorting to eminent domain in effecting such acquisitions,
>
> (3) whether the time is a fitting one,
>
> (4) whether there is a need for the property to the extent sought to be acquired, . . .
>
> (6) whether there is any need for the particular estate sought to be condemned, . . . (Emphasis added.)

In Salt Lake County v. Ramoselli, supra, the District Judge refused to grant Salt Lake County's petition to condemn the land belonging to the defendants because the County had no plans to use the property in the near future, and in fact, adjoining land acquired six years earlier had not yet been put to the use for which it was acquired by the County. In dicta, the Court said that there is judicial review of the necessity of the taking. The trial Court was sustained and the Court held that when evidence supports the decision, the lower Court decision will not be disturbed. The Court stated:

> Plaintiff's challenge to the judgment fails since the parties sought and stipulated for the decision and there is an abundance of admissible, competent, substantial evidence to support the same.
>
> In accord with the numerous pronouncements of this court, no attempt should be made to substitute our judgment for that of the trial court. 567 P.2d at 184.

Since there is evidence in the present case to support the decision, Ramoselli indicates that the decision must be upheld. To use Ramoselli, as Defendants do, to reverse the present case, is not a proper application of Ramoselli. In the present case not only are there present plans for the rest area and sewage lagoon, but construction has begun on the rest area. Therefore, the basis for which the order of immediate occupancy was denied in Ramoselli does not exist in the present case.

POINT IV

PLAINTIFF HAS BEEN GIVEN STATUTORY AUTHORITY TO CONDEMN FOR THIS PURPOSE.

Utah Code Annotated, Section 27-12-96(11),(1953 as amended), states:

> Acquisition of rights of way and other real property.-The commission is authorized to acquire any real property or interests therein, deemed necessary for temporary, present, or reasonable future state highway purposes by gift, agreement, exchange, purchase, condemnation, or otherwise. Highway purposes as used in this section or otherwise in this act shall include, but shall not be limited to the following:
>
> . . . (11) The construction and maintenance of roadside rest areas adjacent to or near any highway.

23 C.F.R., Section 752.106(d) states: "Safety rest areas and scenic overlooks, where the need exists, are to be provided with comfort and convenience facilities reasonably necessary to accommodate the traveling public. . . ." Thus, included within a roadside rest area are toilets, drinking water, and generally grass or other type of vegetation that must be watered. These types of services create certain amounts of waste that must be disposed of. Since the existing sewer is too distant (R. 41) and the high water table prevents the construction of a septic tank and accompanying drain fields, (R. 84-86) the only feasible solution is to construct the type of sewage lagoon proposed by plaintiff. This must of necessity

be part of the rest area in order for the rest area to function properly and fulfill the purpose for which it is constructed.

Defendants contend that there is no express authority to condemn for a sewage lagoon and therefore Plaintiff cannot condemn land for such a purpose. Such an interpretation of the statute would be contrary to the intent of the Legislature which passed the statute. If Plaintiff cannot construct a sewage lagoon in conjunction with the rest area, it will also be effectively stopped from building the rest area. Such was certainly not the intent of the Legislature, for the language of the statute is very clear and express in giving Plaintiff the authority to condemn land for ". . . the construction and maintenance of roadside rest areas . . ." Maintenance of a rest area must include the disposal of wastes created by the services offered at the rest area. Thus, the power to construct and maintain a sewage lagoon is clealry implied in the statutory grant of power to condemn for roadside rest area purposes.

Defendants cite Great Salt Lake Authority v. Island Ranching Co., 18 U.2d 276, 421 P.2d 504 (1966) for the contention that the power to condemn cannot be obtained by implication. In that case, the Great Salt Lake Authority was created to preserve and develop the Great Salt Lake and its

environs. Although the Authority was not given the power of eminent domain, it tried to exercise that power by condemning defendant's lands, claiming that such power was consistent with the statutory powers given it. This Court refused to find such powers and held that the Great Salt Lake Authority did not have the power of eminent domain. That case is not properly applied to the present case because here Plaintiff has the express power to acquire land by condemnation. Furthermore, the statute conferring that power does not limit its exercise to the purposes mentioned. The statute, in pertinent part, reads: "Highway purposes as used in this section or otherwise in this act shall include but shall not be limited to the following: . . ." (Emphasis added.) Utah Code Annotated, 27-12-96 (1953, as amended). Thus, Island Ranching Co. is not applicable as Plaintiff has been given the express authority to construct the roadside rest area, which includes the sewage lagoon.

Defendants also contend that "area" means one contiguous plane or extent of surface and that therefore the sewage lagoon cannot be located on the east side of the freeway but must be located on the west side, contiguous to the rest area. Such a contention is without merit in view of the Department of Health regulations which require this type of lagoon to be at least 1000 feet from any inhabited location.

(R. 84-88) Since the rest area is an inhabited area, these regulations can only be complied with by placing the lagoon at least 1000 feet from the rest area. Thus, the lagoon can never be contiguous to the rest area, as Defendants urge. Yet, the sewage lagoon is a necessary adjunct of the roadside rest area and is essential to the very existence of the rest area. Therefore, the power to condemn this land is necessarily implied in Utah Code Annotated 27-12-96(11), (1953 as amended).

POINT V

PRIVATE AND PUBLIC USE COMMINGLED IN A PUBLIC PROJECT DOES NOT DETRACT FROM THE PUBLIC NATURE OF THE PROJECT AND ITS PUBLIC NECESSITY.

Plaintiff will not immediately need the full capacity of the sewage lagoon. Therefore, as an accommodation to the nearby landowners, (R. 85-11) Plaintiff will allow them to hook into the lagoon. This will be done at no additional expense to Plaintiff and comports with the policy of the Utah State Division of Health to combine waste water treatment facilities to the neatest extent possible. (R. 46) The regulations promulgated by Plaintiff make it clear that this is only a temporary

use by the landowners. (R. 46) Point 1 of the regulations reads: "1. A temporary capacity of the pond in excess of that needed by UDOT may be used by others. . . ." (R. 46)

Plaintiff's projections indicate that Plaintiff will require the full capacity of the lagoon within 20 years to service the rest area. (R. 5-16) At that time, all private use will be terminated without compensation. Such a commingling of uses does not detract from the public necessity of the lagoon, and in fact should be favored to prevent waste and duplication of efforts. Nichols states:

> An acquisition which is primarily for private benefit is not for a public use. However, an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. Where, despite the commingling of private and public uses, the taking will aid in the establishment of a public project, the courts are disposed to ignore the private element as purely incidental; and in any event, where such uses are not so commingled as to be inseparable, the authorizing statute will be upheld. 2A, Nichols on Eminent Domain, Section 7.222[4], p. 7-58 to 7-59.

In the present case, the public need for this lagoon to service the rest area justifies the taking despite a minimal amount of private use. Such a use is merely incidental to the public use and requirements. This is especially the

case where, as here, the uses are separable. The regulations make it clear that all private users may be terminated at any time. (R. 85-11) At that point, the incidental private use will be gone and the project will serve only the public. The public character of the project is not tarnished by allowing private landowners the use of the facility.

This result has received this Court's approval in Thomas v. Daughters of the Utah Pioneers, 114 Utah 108, 197 P.2d 477 (1948), appeal dismissed 336 U.S. 930 (1949). In that case the Daughters of the Utah Pioneers (DUP) was given permission to erect a museum on State property to display pioneer relics. The DUP apparently had trouble raising the funds, so the State eventually built the building and leased it to the DUP to manage. When construction was beginning, suit was brought alleging, inter alia, that this was an expenditure of public monies for a private purpose. The Court disagreed and held that the major purpose was public and any private benefit to the DUP was incidental. The Court stated: "If the law in its final form is construed . . . as evidencing as the paramount purpose of the legislature the erection of a pioneer memorial building by the State and only incidentally to put such structure in the hands of the Daughters of the Utah Pioneers for the custody and control thereof, then the provision leasing the structure to the Daughters is clearly

severable from the provisions relating to the erection of the building." 197 P.2d at 498.

The lease to the DUP was one dollar a year for 99 years and conferred no greater benefit upon the State than does allowing landowners the use of the sewage lagoon free of charge but subject to termination at any time. The overwhelming purpose of the lagoon is to accommodate the traveling public using the rest area and only incidentally benefits nearby landowners.

Defendants argue that the proposed sewage lagoon was enlarged from three to six acres on this site only so as to allow nearby landowners to use the lagoon. This assertion is erroneous. The Department of Health required a six-acre lagoon so no matter where the site for the lagoon was established, the area had to be six acres. (R. 84-13) Furthermore, even with the increased size of the lagoon, Plaintiff's experts testified that Plaintiff would require the full capacity of the lagoon within 20 years. (R. 85-16)

Because the project is a direct benefit to the public, and an incidental private use does not detract from the public nature of the project, the District Court should be affirmed.

POINT VI

THE LOCATION OF THE SEWAGE LAGOON WAS MADE BY EXPERTS WHO DETERMINED THIS LOCATION TO BE THE BEST LOCATION. THEREFORE, THE DECISION WAS NOT ARBITRARY AND CAPRICIOUS.

The necessity for the taking was determined by Plaintiff and concurred in by the District Judge in writing the Memorandum Decision. (R. 49) The size and location were left to the experts who work for Plaintiff. This is a proper method of determination and is not reviewable. Nichols state

> (4) When it has been decided that a public improvement shall be constructed, whether the power of eminent domain shall be invoked is not a matter for judicial determination. The owner of the land condemned is not entitled to be heard upon the question whether an equally available site was not already in possession of the public, or could be bought elsewhere for less than the fair value of his land. When it is decided to take land by eminent domain, what land shall be taken and how much, are matters in the discretion of the legislature, though land that manifestly cannot be used cannot be taken. 1 Nichols on Eminent Domain, Section 4.11[3](4), pp. 4-196 to 4-198. (Emphasis added.)

The experts who testified at the hearing were civil engineers with several years of experience. (R. 84-3 and 85-2 and 3) They testified that the lower elevation of the gro on the east side of the freeway made the east side preferabl for such a lagoon. (R. 84-6 and 7 and 85-13) This will cau the waste to flow by gravity and thus save the expense of p

or siphoning. It is also simpler and easier to maintain. The experts also testified that the location chosen on the east side of the freeway was the best location on that side because of the Department of Health regulations which require this type of sewage lagoon to be at least 1000 feet away from any inhabited area. (R. 84-8) The witnesses were examined by defendant during the taking of their depositions and also cross-examined at the hearing about other sites but insisted that the site selected was the best site available for this project. This uncontradicted testimony by experts familiar with the project and terrain should not be reversed on appeal. In Beirne v. Mitchell, 587 P.2d 153 (Utah, 1978) plaintiff sued the Department of Social Services to have welfare benefits restored that had been cut back. The Court refused to do so and stated:

> Because of the responsibilities with which the administrative agency is charged, and its presumed knowledge and expertise in that field, the courts hold that it should be allowed considerable freedom of action, with as little judicial interference as possible; that they are reluctant to intrude into the agency's determinations, and will not do so unless it appears that the agency has acted in excess of its authority, or so unreasonably that it should be deemed capricious and arbitrary. 587 P.2d at 155.

In Central Bank & Trust Co. v. Brimhall, 28 U.2d 14, 497 P.2d 638 (1972), a holding corporation was given permission

to open a bank in Springville. Plaintiffs sued, claiming that the bank was a branch bank in violation of Utah law and therefore the decision of the bank commissioner was arbitrary and capricious. The Court disagreed and said:

> In the field of administrative law the assumption is indulged that the administrator (or administrative tribunal) possesses superior knowledge and expertise because of specialized training and experience, and the focus of interest within the particular field. For this reason the well-established rule is that the courts indulge him considerable latitude in determinations he makes on questions of fact and also in the exercise of his discretion with respect to the responsibilities which the law imposes upon him; and they will not interfere therewith unless it appears that he acted in excess of his powers, or that he so abused his discretion that his action was capricious or arbitrary. 497 P.2d at 641.

Plaintiff is an administrative agency with the authority to determine the location of the rest area with its adjunct sewage lagoon. As is pointed out in 1 Nichols, Section 4.11 [3], ante p. 22, the location is left to the discretion of the Legislature (or administrative agency authorized to act for the Legislature). Because Plaintiff is presumed to have expertise in the field and in fact the persons who selected the site and testified at the hearing are experts in the field, the decision should not be reversed unless it is arbitrary and capricious.

In Plumbing, Heating and Piping Employees Council of Northern California v. Quillin, 64 Cal. App. 3d 215, 134 Cal. Rptr. 332, 335 (1976), arbitrary and capricious was defined: "The phrase arbitrary and capricious encompasses conduct not supported by a fair or substantial reason [citing case], stubborn insistence on following an unauthorized cause of action [citing case], and a bad faith legal dispute [citing case]." In that case, an attempt to recover attorney's fees was denied because the lower Court had not been arbitrary and capricious in not awarding attorney's fees.

A review of the record indicates that the present decision was not arbitrary and capricious but that it is in the interest of the public to construct the lagoon on this land, which is the best location available. The evidence justifies the result and so should be affirmed. As this Court stated in Central Bank & Trust Co. v. Brimhall, supra, 497 P.2d at 641:

> Our duty is to look upon the whole evidence in the light favorable to the determination made by the Bank Commissioner and the trial court, and to sustain them if there is a reasonable basis in the evidence to justify doing so.

POINT VII

THE SITE SELECTED WILL SAVE PUBLIC MONEY WHICH IS A PROPER EXERCISE OF THE POWER OF EMINENT DOMAIN.

In U.S. ex rel. T.V.A. v. Welch, 327 U.S. 546 (1946), a dam had been built which flooded a state highway, cutting off access to about 200 people. Rather than rebuild the road at tremendous expense, the T.V.A. condemned the land belonging to the 200 people with the intent to donate it to the Great Smokey National Park. The Fourth Circuit held the taking void but the United States Supreme Court reversed and held that a taking to save money is proper. The Court stated, "The cost of public projects is a relevant element in all of them, and the Government, just as anyone else, is not required to proceed oblivious to elements of cost. [Citing case.] And when serious problems are created by its public projects, the Government is not barred from making common sense adjustment in the interest of all the public." 327 U.S. at 554.

In Old Dominium Land Co. v. U.S., 296 F. 20 (4th Cir. 1924), aff'd. 269 U.S. 55 (1925), the government leased property from defendant and built warehouses and other structures on it. At the end of the lease period, the lessor refused to extend the lease. In order to avoid the loss of

$1,522,000.00 worth of buildings, the government condemned the land, worth $129,700.00. The lessor claimed this was not a public use since the sole purpose was to save money. The Court upheld the taking, stating that the taking prevented the public from bearing a loss.

In City of Gretna v. Brooklyn Land Co., 182 La. 543, 162 So. 70 (1935), the city condemned land to run water pipes and install pumps at a nearby river. The city took more land than was absolutely necessary for the pipes and pumps in order to avoid the costs of building a fire wall to protect the pumps. The landowners complained that this was an improper use and that other land was available. The Court upheld the taking on the basis that it was less expensive:

> The testimony shows that a strip of only 15 or 20 feet extending to the river is all that is necessary for pipes and the pumps. It is also shown, however, that the 50-foot strip which the city seeks is on the edge of defendant's property and adjacent to the wharf or warehouse built on the river front, and that if the pumps were erected within a distance of 30 feet from this wharf, it would be necessary for the city to erect a fire wall between the warehouse and the pumps. This would entail considerable expense, and in order to avoid such expense, it is necessary that a space be left between the pumps and the warehouse of at least 30 feet. 162 So. at 72.

It is also the clear intent of the Utah State Legislature that eminent domain proceedings may be used to reduce

costs. In Utah Code Annotated, Section 27-12-99, (1953 as amended), the Department of Transportation is given authority to acquire more land than is required for a highway in order to avoid high severance damages. That Section reads:

> Whenever a part of an entire lot, block or tract of land or interests therein or improvements thereon is to be acquired by the commission and the remainder is to be left in such shape or condition as to be of little value to its owner or to give rise to claims or litigation concerning damages, the commission may acquire the whole of the same and may sell the remainder or may exchange the same for other property needed for highway purposes.

This Section indicates an intention to keep costs to a minimum. Utah Code Annotated, Section 27-12-100, (1953 as amended further indicates that intention:

> In cases where it is found advisable by the commission to acquire real property, interests therein or improvements thereon in advance of the actual construction, reconstruction, or improvement of highways or to acquire the same in order to save on acquisition costs or avoid the payment of excessive damages, such real property, interests therein, or improvements thereon may be leased or rented by the commission in such manner, for such periods of time, and for such sums as are determined by the commission to be in the best interest of the state. The commission may employ private agencies to manage such rental properties when it is deemed to be more economical and in the best interests of the state to so do. All moneys received for such leases and rentals, after deducting any portion to which the federal government may be entitled, shall be deposited with the state treasurer and credited to the state road fund. (Emphasis added.)

These statutes and cases indicate that saving money is a proper exercise of the eminent domain power. Plaintiff's evidence shows that the site selected for the sewage lagoon is the least expensive site, (R. 84-20 to 23 and R. 85-9) and since it meets the other requirements for a sewage lagoon, is the best location for the lagoon.

Defendants cross-examined Plaintiff's witnesses as to cost but did not contradict their testimony in any way during the hearing. However, after the hearing, the affidavits of two alleged experts were presented to the Court in the Defendants' memorandum of the applicable law. (R.50) These affidavits challenged Plaintiff's evidence only as to costs. These affidavits were properly disregarded by the trial Judge, as discussed in Point I of Plaintiff's Brief. However, even if they had been considered, they are not persuasive when compared with Plaintiff's evidence.

Robert Whitaker issued an affidavit (R. 36) alleging the cost of installing a pipe under the freeway. His estimate is much higher than that made by two witnesses for Plaintiff, Woodrow A. Burnham and Vern B. Wilde. (R. 84, 85) However, their calculations are based upon similar work recently performed by other contractors for Plaintiff. (R. 84-21 and 22) The affidavit of Mr. Whitaker is controverted and is in no way conclusive. When this work is put out on bid,

the Plaintiff is not obligated to accept the bid made by Mr. Whitaker's company but is free to accept a lower bid, and in fact is required by law to accept the lowest bid submitted by a responsible contractor. See Utah Code Annotated, Section 27-12-108, (1953 as amended).

Wilford E. Skeen issued an affidavit (R. 34) alleging the cost of removing dirt from a six-acre site contiguous to the rest area and scattering it over the 19.54 acres constituting the rest area. This is approximately one-tenth of the estimated cost according to the testimony of Vern B. Wilde. (R. 84-21 and 22) However, the affidavit of Mr. Skeen is based on the assumption that the dirt excavated from the six acres is suitable for compaction as fill dirt on the rest area site. There has been no foundation established to support this assumption. Furthermore, when counsel for Plaintiff became aware of this affidavit after the hearing and questioned Mr. Wilde about it, Mr. Wilde indicated that the dirt is mostly clay and unsuitable for compaction as fill dirt on the rest area site. (R. 44) Based on this knowledge, Mr. Wilde's testimony as to the much greater cost of hauling the dirt away from these alternative sites is based on the fact that the excavated material is not suitable for compaction and therefore will have to be hauled a much greater distance than the 1,250 feet that Mr. Skeen is willing to move it at his stated price.

Because Plaintiff may exercise its eminent domain power to save money, and the uncontested testimony indicates that the selected site is the least expensive, and even if the testimony of Plaintiff were to be contested, the conflicting evidence is not persuasive, the judgment of the District Court should be affirmed.

CONCLUSION

Defendants are challenging Plaintiff's right to exercise the power of eminent domain vested in Plaintiff by statute. A sewage disposal facility is a necessary adjunct to a roadside rest area constructed to accommodate the traveling public. As such, the power to condemn for a rest area must necessarily carry the implied authority to condemn for a sewage disposal facility to serve the rest area.

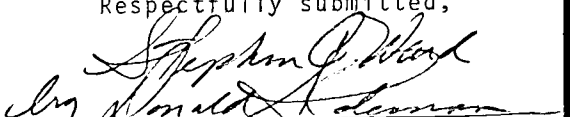
The necessity of the taking having been determined by the Legislature and found by the District Court Judge, the decision is not reversible. Plaintiff is the expert body to determine where the best location is for such a facility. Plaintiff, in selecting this site, has not acted in bad faith but has acted with the best interest of the public in mind. Under this situation, the decision is not arbitrary and capricious and therefore not reversible.

The evidence produced at the hearing is ample to support the judgment of the District Court. The District Court is in a better position to review and weigh the evidence. This Court should not substitute its judgment for that of the lower Court in such a situation.

The only evidence offered by Defendants was after the hearing had concluded. As such, it was untimely and was properly not considered. This appears to be an attempt on the part of Defendants to sneak evidence into Court without giving Plaintiff the opportunity to cross-examine the witness or offer rebuttal testimony. The exclusion of this evidence prevented Plaintiff from being extremely prejudiced.

The order of immediate occupancy should be affirmed and Defendants ordered not to interfere with the construction of the sewage lagoon.

Respectfully submitted,



STEPHEN C. WARD
Assistant Attorney General
Attorney for Plaintiff-
Respondent

This is to certify that two copies of the foregoing Respondent's Brief were mailed, postage prepaid, to Glen E. Fuller, Attorney for Appellants, Suite 300, 455 South 3rd East Salt Lake City, Utah 84111, this 23rd day of July, 1979.